

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

9/13/99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Klymax, Inc.

Serial No. 75/065,198

Eric O. Haugen of Haugen & Nikolai, P.A. for Klymax, Inc.

Mary Rossman, Trademark Examining Attorney, Law Office 109
(Ron Sussman, Managing Attorney).

Before Hairston, Chapman and Bottorff, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration of the mark KLYMAX (in
typed form) for goods identified as "t-shirts, hats,
sweatshirts, polo shirts, shorts, tank tops, and ski
gaiters, sold and marketed to those interested in
snowmobiling and personal watercraft usage."¹

¹ Application Serial No. 75/065,198, filed February 29, 1996.
The application is based on use in commerce; July 1, 1993 is
alleged as the date of first use of the mark anywhere, and
September 1, 1995 is alleged as the date of first use of the mark
in commerce. As published, the identification of goods included

The Trademark Examining Attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that applicant's mark, as applied to the goods identified in the application, so resembles the registered mark CLIMAX (in typed form) for "ladies' dresses, skirts, pants, suits, jackets and jump suits"² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney have filed main briefs, and the applicant has filed a reply brief. Applicant has not requested an oral hearing.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any

semi-colons, rather than commas, after each of the clothing items except "ski gaiters." However, it is clear from applicant's arguments that the language "sold and marketed to those interested in snowmobiling and personal watercraft usage" is intended to apply to all of the clothing items listed, not just to the ski gaiters. The use of semi-colons in the identification of goods militates against this intended construction of the identification of goods. Accordingly, to effect applicant's intended construction of the identification of goods, the Board has replaced the semi-colons with commas.

² Registration No. 1,050,727, issued October 19, 1976 and renewed December 1, 1996.

likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Initially, we must address an evidentiary matter. Applicant relies on a chart (originally submitted to the Trademark Examining Attorney during prosecution of the application) of what purports to be a listing of pairs of coexisting registrations in which, according to applicant, the respective marks and goods involved in each pair of registrations are more closely related than are the marks and goods involved in the present case. Applicant argues that this chart is evidence of the Office's policy with respect to issuing Section 2(d) refusals in cases involving clothing items, and evidence that a Section 2(d) refusal of applicant's mark in this case would be inconsistent with that policy. The Trademark Examining Attorney has objected to any consideration of this chart on the grounds that the registrations cited therein have not been properly made of record, and that they are irrelevant.

We sustain the Trademark Examining Attorney's objection.³ Furthermore, and in any event, our likelihood of confusion determination in this case must be made on the basis of the marks and goods involved in applicant's application and the cited registration.

Our likelihood of confusion analysis in this case begins with a consideration of whether applicant's mark KLYMAX and the registered mark CLIMAX, when considered in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. We find that applicant's mark KLYMAX would be perceived by purchasers as merely a novel misspelling of the word "climax," the ordinary English word which comprises the registered mark CLIMAX. Thus, the marks KLYMAX and CLIMAX would be

³ We agree with the Trademark Examining Attorney that the purported third-party registrations listed in applicant's chart may not be considered because they have not been made properly of record. See *in re Duofold Inc.* 184 USPQ 638 (TTAB 1974). The Trademark Examining Attorney properly raised this objection in her May 1, 1998 office action, which was the first written office action following applicant's submission of the chart with its November 3, 1997 request for reconsideration of the final refusal, and properly maintained her objection to consideration of the chart in her brief by arguing, *inter alia*, that the chart is irrelevant because copies of the registrations are not of record. Applicant's assertion that the Trademark Examining Attorney, in a mid-December 1997 telephone conversation with applicant's attorney, discussed the merits of applicant's chart and did not raise any objection to the chart, is unavailing. This appeal must be based exclusively on the written record in the application file. See Patent and Trademark Office Rule 1.2, 37 C.F.R. §1.2. The Trademark Examining Attorney's objection was properly made of record and maintained, and applicant was on notice thereof.

pronounced the same way. Furthermore, they would carry the same connotation, i.e., that of the word "climax," a word which appears on this record to be arbitrary as applied to the goods involved in this case. Due to the replacement of the letters "C" and "I" in the registered mark with their phonetic equivalents "K" and "Y" in applicant's mark, the marks are not visually identical. However, the marks have certain visual similarities, including the fact that they both are six-letter designations ending with "MAX."

Viewing the marks in their entireties, we conclude that they convey similar commercial impressions, and that confusion would be likely to result from their use on related goods.

Thus, we must decide whether the goods identified in applicant's application are sufficiently related to the goods identified in the cited registration that source confusion is likely to result from use thereon of the similar marks involved in this case. It is not necessary that the goods be identical or even competitive to support a holding of likelihood of confusion, it being sufficient that they are so related or that conditions surrounding their marketing are such that they are encountered by the same persons who, because of the relatedness of the goods and the similarities of the marks, would believe mistakenly

that the goods originate from or are in some way associated with the same producer. See *The Black and Decker Manufacturing Company v. Big Yank Corporation*, 231 USPQ 484 (TTAB 1986).

After it received the Trademark Examining Attorney's Section 2(d) refusal based on the cited registration, applicant amended its identification of goods to add the words "sold and marketed to those interested in snowmobiling and personal watercraft usage." Applicant argues that this language constitutes an express limitation to applicant's goods and to the trade channels and customers for applicant's goods, and that applicant's goods, as so limited, are dissimilar and unrelated to the ladies' apparel items identified in the registration. We are not persuaded by applicant's argument.

The actual clothing items identified in the application, i.e., "t-shirts, hats, sweatshirts, polo shirts, shorts, tank tops and ski gaiters" are not, except for "ski gaiters," items which normally would be worn only in connection with the activities of snowmobiling or personal watercraft usage. That is, these clothing items are not in the nature of equipment specifically used in those sports or which would normally be purchased only through dealers or other outlets specializing in those or

other, similar sports. Rather, these goods, like registrant's goods, are basic items of clothing.

In view thereof, the language "sold and marketed [only] to those interested in snowmobiling and personal watercraft usage" in applicant's identification of goods cannot be construed as a limitation as to the trade channels in which applicant's goods might be sold. That is, we cannot assume that applicant's goods are sold only by snowmobile or personal watercraft dealerships, for example. Rather, we must presume that applicant's clothing items move in all normal trade channels for such goods and that they are sold to all normal classes of customers for such goods. *See In re Elbaum*, 211 USPQ 639 (TTAB 1981). Such trade channels would include department and apparel stores, where they might be purchased by persons "interested in snowmobiling and personal watercraft usage." These are also the trade channels in which registrant's clothing items would normally be sold.

Furthermore, the customers for applicant's goods and for registrant's goods must be deemed to overlap. The goods identified in the registration are not limited as to classes of customers, except insofar as the customers for ladies' apparel would generally be women. Therefore, we must presume that the registrant's goods are sold and

marketed to all normal purchasers for such goods, including to all women. *In re Elbaum, supra*. We also reasonably assume that women, who are purchasers of ladies' apparel items such as registrant's, also may be persons "interested in snowmobiling and personal watercraft usage" and that they therefore would be potential purchasers of applicant's clothing items. Moreover, a woman "interested in snowmobiling" is likely to be a potential purchaser of "jackets," which are among the goods included in registrant's identification of goods.

For these reasons, we find that applicant's goods, as identified in the application, are sufficiently commercially related to the goods identified in the cited registration that source confusion is likely to result when the respective goods are marketed under the similar marks involved in this case.

We have carefully considered, but are not persuaded by, applicant's arguments with respect to the other *du Pont* factors, i.e., that registrant's mark is not a famous mark, that applicant is not aware of any instances of actual confusion, that applicant's registrations of the KLYMAX mark for various other goods and services related to snowmobile, motorcycle and personal watercraft equipment and accessories constitutes a "family" of marks, and that

applicant's purchasers are "a sophisticated segment of the buying population in that these individuals constitute a narrow group of buyers."⁴ Rather, having found that applicant's mark is confusingly similar to the cited registered mark, and that applicant's goods and the goods identified in the cited registration are related in that they are presumed to move in the same trade channels and to be marketed to the same classes of purchasers, we conclude

⁴ Although a famous mark may be entitled to a relatively broader scope of protection, that does not mean that a registered mark which is not famous is entitled to less than the normal scope of protection otherwise afforded to registered marks. Also, the alleged absence of actual confusion is entitled to little or no weight in our likelihood of confusion analysis in this case because applicant has not submitted any evidence, e.g., as to the extent of applicant's and registrant's respective sales, advertising expenditures and geographical market areas, from which we might conclude that there has been any meaningful opportunity for actual confusion to have occurred in the marketplace. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Likewise, applicant's claimed ownership of other registrations of the KLYMAX mark for various other goods and services does not give applicant a "family" of marks; there is only one mark, and one mark does not make a family. Finally, by asserting that its purchasers comprise "a sophisticated segment of the buying population in that these individuals constitute a narrow group of buyers," applicant appears to be arguing that confusion is unlikely due to the sophistication of purchasers. However, we are not persuaded that purchasers of clothing items such as those involved in this case are necessarily sophisticated purchasers, much less that they are sophisticated about trademarks and immune to source confusion resulting from the use of similar marks on related goods. See *Refreshment Machinery Incorporated v. Reed Industries, Inc.*, 196 USPQ 840, 843 (TTAB 1977).

that a likelihood of confusion exists in this case.

Decision: The refusal to register is affirmed.

P. T. Hairston

B. A. Chapman

C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board